IN THE

# Supreme Court of the United States

**October Term, 1977**

**No. 77-689**

INDIANA & MICHIGAN ELECTRIC COMPANY,
*Petitioner,*

*v.*

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
municipal corporations,
*Respondents.*

## PETITIONER'S SUPPLEMENTAL BRIEF

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May 10, 1978

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## PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Indiana & Michigan Electric Company, pursuant to Rule 24(5) of this Court, files this Supplemental Brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and in response to the Brief for the United States as *Amicus Curiae*.

## Discussion

On January 16, 1978 the Court invited the Solicitor General to submit the views of the United States in connection with the underlying Petition for a Writ of Certiorari. On May 2, 1978, the Solicitor General filed a Brief which presents irreconcilable positions on behalf of the Department of Justice and the Federal Energy Regulatory Commission ("Commission"). In light of the views expressed, we respectfully submit that the proper disposition should be the granting of the writ, rather than its denial as suggested in the Government's Brief. This would seem to be the appropriate way to provide the clarification necessary to avoid the confusions and conflicts between the Commission and the many lower courts involved, which will inevitably flow from the positions of the Government agencies reflected in the United States' Brief.

While there is not yet a conflict between the circuits on the issues presented by the Petition, the basic conflict revealed between the Department of Justice, which is empowered to enforce the provisions of the Sherman Act, and the Commission, to which Congress has entrusted the task of eliminating discrimination in rates for electric service, including the type of discrimination that was the subject of this Court's decision in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976), is equally, if not more, serious and in need of prompt supervisory action by this Court. If there is to be any semblance of uniformity or orderly procedure in the disposition of price squeeze claims in this regulated industry, it can be achieved only if this Court now reviews the questions presented, before the district courts and the several circuits are catapulted into the midst of this difference of opinion within the Government.



The chasm between the views of the Department of Justice and those of the Commission reflects, we suggest, recognition on the part of the Commission that the basic position asserted by Petitioner correctly reflects the Congressional purpose. Since the Commission maintains that its determination as to the reasonableness of wholesale rates, as well as its determination with respect to competitive impact and antitrust legality would "be binding on the antitrust court" (Solicitor General's Br. at 19, 22), it naturally follows that there would be a wasteful expenditure of the time of many district courts in performing the ministerial role of supervising pre-trial discovery while awaiting the views of the Commission on all substantive issues.

A resolution of the issues now will settle the jurisdictional question and will give guidance as to how the strained resources of the Federal district courts should be allocated. Indeed, if the district courts lack jurisdiction, or even if, as the Commission claims, the courts are bound by the Commission's findings, it would appear unnecessary and burdensome to require the district courts to embark upon and supervise the exhaustive discovery associated with complex antitrust litigation. Both the precious time of the courts, already overburdened, and the energies of a utility company's personnel, needed in solving critical energy problems, would be conserved by definitive disposition of the basic questions now.

On the other hand, to deny certiorari would result in the atomization of the price squeeze claims into separate legal

and fact issues which might well be tossed back and forth between the Commission and the district court for independent resolution.[1] On review, these separate legal and fact issues would be distributed for separate appellate resolution among circuit courts of appeal, without any assurance that, on such separate review, the potential disparities in results reached can be eliminated. The conflicts within the Government foreshadow conflicts which must eventually be resolved here. No reason for delay outweighs the public advantages of early resolution.

Moreover, in view of the primacy which the Commission attaches to its resolution of price squeeze issues and the Commission's view that its findings on such issues are "binding" upon the antitrust court, it seems clear, despite the disclaimer in the Solicitor General's Brief, that the Commission in fact endorses and supports our position that it has at least primary jurisdiction over price squeeze issues.[2] Indeed, the United States concedes that the "practical effect" of the Commission's position is to allow the Commission to "confer antitrust immunity" upon the acts alleged in the complaint (Solicitor General's Br. at 22). This stands as an additional reason supporting the grant of the Petition.

1. The need for early resolution of the jurisdictional issues raised by the Petition is further pointed up by an analysis of the Solicitor General's Brief. We have set forth in Appendix "A" hereto excerpts from that Brief which reflect the antagonistic views of the United States and the Commission and internal inconsistencies in the position of each. Some of those conflicting views would deprive the antitrust court of any functions other than to supervise discovery, to resolve threshold issues, and to dispatch numerous references to the Commission. The analysis contained in Appendix "A" strongly suggests that this Petition should be granted if this Court's decision in *Conway* is to be given what we believe is the scope and effect intended for it by this Court.

2. At page 15 of his Brief, the Solicitor General sets forth as the unified view of the United States the following:

> "In the present case, the Commission already is conducting a proceeding to determine the lawfulness under the Federal Power Act of the price squeeze allegedly resulting from the 1976 wholesale rate. Accordingly, there would be no need for the antitrust court to refer this case to the agency to make that determination. The question, rather, is whether the district court should defer proceeding with the antitrust case to enable the Commission to exercise its primary jurisdiction over certain issues."

*(footnote continued on next page)*

Four pages later (at 19), the Solicitor General provides this Court with the views of the Commission:

> "• • • In sum, before the respondents can prevail on their antitrust complaint, the Commission must determine the ultimate issue of the reasonableness of the wholesale rates in relation to the retail rates."

These statements seem to amount to recognition that a district court is required to refer this case to the Commission for its resolution of all of the ultimate facts. Based upon this recognition, it would be illogical and a waste of judicial assets to allow the district court to proceed before the Commission completes its functions. It is for this reason, and because of the recognition above quoted, that we have not further responded to the arguments raised by the Solicitor General on the issue of primary jurisdiction. In that regard, we rest on the arguments presented to the Court in our original Petition (Point IV, at 24-28).



There is nothing in the Solicitor General's Brief which harmonizes the decisions of this Court in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975) and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) with the contrary result reached by the Court below, other than an attempt to distinguish those cases on the ground that they "involved completely different statutory schemes" (Solicitor General's Br. at 13). The irreconcilable conflict which was found by this Court in *Gordon* and in *NASD* to work an implied repeal of the Sherman Act in cases arising under the Securities Exchange Act and the Investment Company Act, seems to

us to be no different from the conflict which the Petition points out as existing between the Sherman Act and the Federal Power Act, as the latter was interpreted by this Court in *Conway*.

The reliance of the Solicitor General on the decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) is, in our view, misplaced, as it was in the Briefs filed by Respondents and by the *amicus curiae* who oppose the grant of the Petition. The quotations from *Otter Tail* appearing in the Brief are all taken from Part I of the Court's opinion dealing with the issue of Otter Tail's refusal to deal—i.e., the refusal to wheel electric power. This Court's decision in *Otter Tail* on the wheeling issue turned on the legislative history of the Federal Power Act from which this Court found that the Federal Power Commission had no jurisdiction over the wheeling of electric energy, since the "common carrier" provisions, originally proposed, had been eliminated from the Act.

We submit that the Government's Brief serves to emphasize the importance of review by this Court now to provide the lower courts and the Commission with necessary guidance. If the decision below stands and the conflict within the Government leads the courts and commissions[3] on a collision course into what can only be a series of pro-

3. The actions of state commissions are necessarily involved in claims of alleged price squeeze. This is recognized in the Government's Brief (fn. 5 at 14), as it must be, as "state action" under *Parker* v. *Brown*, 317 U.S. 341 (1943). While not specifically enumerated in the "Questions Presented," the principle of "state action" was referred to by Petitioner (Petition, Point III at 20-23), was discussed extensively by the court below (Petition at 16a-17a) and is inherent in the entire problem, especially in light of the Government's Brief.



cedural conflicts, the results will be extremely destructive of a sound administration of the Sherman Act and the Federal Power Act.

The Petition sets forth (at 10-12) the price squeeze cases of which we were then aware and which were then pending before the Commission and before the district courts. They have continued to proliferate. To permit those cases to proceed in the district courts in the face of the Commission's now publicly announced position that its findings are binding on the antitrust court invites confusion compounded.

The circumstances of Petitioner's own situation clearly highlight the difficulties which will ensue if the issues raised by the Petition are not promptly resolved by this Court. The Presiding Administrative Law Judge assigned by the Commission to hear the allegations of price squeeze in connection with Petitioner's 1976 wholesale rate filing has now set October 4, 1978 for the hearing on the price squeeze issues; the district court judge presiding over Respondents' price squeeze antitrust cases issued an order on April 10, 1978 which consolidated those cases for trial, commencing November 14, 1978. If, as the Commission believes, the district court is bound by the Commission's ultimate findings on the price squeeze allegations raised by Respondents, the potential conflict to which we have alluded in our Petition and Reply Brief is elevated to the status of a clear and present danger.

## Conclusion

The Brief of the Government as *Amicus Curiae,* while opposing, actually furnishes additional reasons for granting the Petition. Indiana & Michigan Electric Company submits that its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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May 10, 1978

## APPENDIX A

## Appendix

The views of the Department of Justice and of the Commission as to the respective powers of the Commission and the antitrust court, as presented in the Government's Brief as *Amicus Curiae,* are set forth below on a comparative basis that reflects the incompatibility between them as well as the internal inconsistencies of each.

### 1. Determining the Reasonableness of Past Rates:

The Commission at 21 fn.10:

> "[It is] *appropriate for the antitrust court to refer to the Commission issues involving the reasonableness of past rates.* Although the Commission has no authority to provide retroactive remedies [citation omitted], the need for uniformity in the standards governing just and reasonable rates and the assistance which the Commission's expertise can bring to bear on the technical issues involved suggest that *those issues also be referred to the Commission for its determination.*" (Emphasis added.)

The United States at 22 fn.11:

> "[T]he United States perceives no policy reason which supports making the Commission's determination of the competitive impact of a price squeeze caused by past rates binding on the antitrust courts."

### 2. Determining the Reasonableness of Present Rates:

The United States at 23:

> "[I]n some cases the Commission's standards may be sufficiently clear and applicable to the facts that *the court could apply them without the Commission's expertise.*" (Emphasis added.)

The United States at 22-23:

"*As long as the antitrust court* limits itself to the competitive implications of the price squeeze and *refrains from independent assessment of the reasonableness of the jurisdictional rates,* there is no danger of an undesirable court-agency conflict arising." (Emphasis added.)

The United States at 23:

"[T]he [antitrust] court should be bound by the Commission's determination of the reasonableness of the wholesale rates *only* with respect to their cost and all of the other factors *traditionally* applied in such a ratemaking determination." (Emphasis added.)

The Commission at 18:

"If, in its pending proceeding, the Commission were to conclude under *Conway* that the differential between the wholesale and retail rates is justifiable and not the product of anticompetitive manipulation, and *therefore approved the wholesale rate as just and reasonable,* established ratemaking principles indicate to the Commission that *a court would be bound by such a determination.*

"The Commission believes that such a conclusion is required because decisions of this Court indicate that only the agency charged by statute with ratemaking responsibilities has jurisdiction to determine whether rates are just and reasonable; any other conclusion would present *a risk of conflicting determinations and standards concerning the reasonableness (and therefore the lawfulness) of rates that is inconsistent with basic principles of rate regulation.* [Citations omitted.]" (Emphasis added.)



**3. Determining the Existence of a Wholesale-Retail Price Differential:**

The Commission at 20-21:

"[The Commission] must also consider 'not only * * * *the existence of a difference between jurisdictional and non-jurisdictional rates,* but also * * * the anticompetitive impact of the particular magnitude of [the] rate differential.' [Citation omitted.] These questions involve *expert exploration* of the reasons for the differential, including the competing systems' operating costs and the engineering and generating factors bearing on those costs. [Citations omitted.]" (Emphasis added.)

The United States and the Commission at 16:

"Respondents' complaint raises *several factual issues that do not call for the application of the Commission's expertise* and that should be considered in the first instance by the district court. These include the following: * * * are petitioner's present retail rates to large industrial users in fact lower than present wholesale rates; [footnote omitted] were petitioner's past retail rates in fact lower than past wholesale rates; * * *" (Emphasis added.)

**4. Determining of the Ultimate Issue:**

The United States at 22-23:

"As long as the *antitrust court limits itself to the competitive implications of the price squeeze* and refrains from independent assessment of the reasonableness of the jurisdictional rates, there is no danger of an undesirable court-agency conflict arising." (Emphasis added.)

The Commission at 18:

"If, in its pending proceeding, the Commission were to conclude under *Conway* that the differential between the wholesale and retail rates is justifiable and *not the product of anticompetitive manipulation,* * * * established ratemaking principles indicate to the Commission that *a court would be bound by such a determination.*" (Emphasis added.)

The Commission at 19:

"In the Commission's view, this Court's decision in *Conway* establishes that one of the criteria for determining the reasonableness of jurisdictional wholesale rates is *the effect on competition* of the relationship of that rate to the non-jurisdictional retail rate. Since the Commission's assessment of that effect is *integral to its determination* of the reasonableness of the wholesale rate (and *vice versa*) *that assessment must,* in the agency's view, *be binding on the antitrust court.* In sum, *before the respondents can prevail on their antitrust complaint, the Commission must determine the ultimate issue of the reasonableness of the wholesale rates in relation to the retail rates.*" (Emphasis added.)

**5. Determining the Remedy:**

The United States and the Commission at 12:

"That is, the court will be available to provide a *complete remedy* for the anticompetitive or monopolistic practices that the Commission cannot fully remedy, without interfering with the agency's authority." (Emphasis added.)

The United States and Commission at 17:

"Indeed, the court of appeals' statement that the district court may at some point refer to the Commission '*to decide* * * * *antitrust damages,* or for other purposes' (Pet. App. 30a), indicates sensitivity of the court below to the proper balance between electric utility regulation and antitrust law enforcement. [Citation omitted.]" (Emphasis added.)



* * *

As is clear from the above, the views of the United States as augumented by the views of the Commission would preclude a district court from making any determination as to the justness and reasonableness of past rates (item "1" above); they would also preclude a district court from making any determination as to the justness and reasonableness of present rates (item "2" above); they would likewise preclude a district court from making any determination as to the existence of a wholesale-retail price differential (item "3" above); they would further preclude a district court from making any determination of the ultimate issue of the existence or non-existence of a price squeeze or of the anticompetitve effects of a price squeeze if the Commission should find one to exist (item "4" above); and finally, they would even preclude a district court from "decid[ing] * * * antitrust damages, * * *" (item "5" above).

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